

State of California
DEPARTMENT OF INDUSTRIAL RELATIONS
Division of Workers' Compensation

**NOTICE OF MODIFICATION TO TEXT OF
PROPOSED REGULATIONS**
**(Subject Matter: Workers' Compensation – Audit Regulations
Title 8, California Code of Regulations Sections 10100.2 et seq.)**

NOTICE IS HEREBY GIVEN that pursuant to Labor Code Sections 59, 129, 129.5, 133, and 5307.3 and Government Code Section 11346.8(c), the Administrative Director of the Division of Workers' Compensation proposes to modify the text of the following proposed amendments to Title 8, California Code of Regulations:

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| Section 10100.2 | Definitions |
| Section 10106.1 | Routine and Targeted Audit Subject Selection; Complaint Tracking; Appeal of Targeted Audit Selection |
| Section 10106.5 | Civil Penalty Investigation |
| Section 10107.1 | Notice of Audit; Claim File Selection; Production of Claims Files; Auditing Procedure |
| Section 10109 | Duty to Conduct Investigation; Duty of Good Faith |
| Section 10111.2 | Full Compliance Audit Penalty Schedule; Target Audit Penalty Schedule |
| Section 10113 | Order to Show Cause Re: Assessment of Civil Penalty and Notice of Hearing |
| Section 10113.3 | Administrative Director's Designation of Hearing Officer |

**PRESENTATION OF WRITTEN COMMENTS AND DEADLINE FOR SUBMISSION
OF WRITTEN COMMENTS**

Members of the public are invited to present written comments regarding these proposed modifications. **Only comments directly concerning the proposed modifications to the text of the regulations will be considered and responded to in the Final Statement of Reasons.**

Written comments should be addressed to:

Guia Carreon, Regulations Coordinator
Department of Industrial Relations
Division of Workers' Compensation
Post Office Box 420603
San Francisco, CA 94142

The Division's contact person must receive all written comments concerning the proposed modifications to the regulations no later than 5:00 p.m. on Wednesday, October 23, 2002. Written comments may be submitted by facsimile transmission (FAX), addressed to the contact person at (415) 703-4720. Written comments may also be sent electronically (via e-mail), using the following e-mail address: dwcrules@hq.dir.ca.gov.

AVAILABILITY OF TEXT OF REGULATIONS AND RULEMAKING FILE

Copies of the original text and modified text with modifications clearly indicated, and the entire rulemaking file, are currently available for public review during normal business hours of 8:00 a.m. to 5:00 p.m., Monday through Friday, excluding legal holidays, at the offices of the Division of Workers' Compensation. The Division is located at 455 Golden Gate Avenue, 9th Floor, San Francisco, California.

Please contact the Division's regulations coordinator, Ms. Guia Carreon, at (415) 703-4600 to arrange to inspect the rulemaking file.

The specific modifications proposed include changes to the text of the proposed amendments Title 8, California Code of Regulations, Sections 10100.2 (Definitions), 10106.1 (Routine and Targeted Audit Subject Selection; Complaint Tracking; Appeal of Targeted Audit Selection), 10106.5 (Civil Penalty Investigation), 10107.1 (Notice of Audit; Claim File Selection; Production of Claims Files; Auditing Procedure), 10109 (Duty to Conduct Investigation; Duty of Good Faith), 10111.2 (Full Compliance Audit Penalty Schedule; Target Audit Penalty Schedule), 10113 (Order to Show Cause Re: Assessment of Civil Penalty and Notice of Hearing), and 10113.3 (Administrative Director's Designation of Hearing Officer). A copy of the proposed modified regulations is attached to this Notice.

FORMAT OF PROPOSED MODIFICATIONS

Proposed Text Noticed for 45-Day Comment Period:

Deletions from the codified regulatory text are indicated by strike-through, thus: ~~deleted language~~.

Additions to the codified regulatory text are indicated by underlining, thus: underlined language.

Proposed Text Noticed for This 15-Day Comment Period on Modified Text:

Deletions from the amended regulatory text as proposed in July 2002, are indicated by double strike-through under-line, thus: ~~deleted language~~.

Additions to the regulatory text as proposed in July 2002, are indicated by a double underline, thus: added language.

SUMMARY OF PROPOSED CHANGES

Modifications to Section 10100.2

Definitions

Section 10100.2 is modified to set forth that the definitions will apply “for audits conducted on or after January 1, 2003” instead of “for injuries occurring on or after January 1, 2003.” Because the definitions concern how the audits will be conducted, it is more appropriate for the terms to be effective on the same date of the implementing statutes, Labor Code sections 129 and 129.5. Section 10100.2(a) has been modified in response to a comment to clarify that claims administrated at a “satellite office” will be considered part of the single adjusting location being audited. Section 10100.2(h) is modified to refer to the correct regulation, Section 10103.2, rather than Section 10103.1. Section 10100.2(p) has been modified in response to comments that the handling of a single claim should not constitute a general business practice. The definition of a general business practice will no longer include separate acts or omission in the handling of a single claim. Section 10100.2(r) has been modified in response to comments that the California Insurance Guarantee Association (CIGA) does not fall within the definition of “an insurer.” Therefore, reference to CIGA has been deleted.

Modifications to section 10106.1 Routine and Targeted Audit Subject Selection; Complaint Tracking; Appeal of Targeted Audit Selection

This proposed section describes the process for selecting a subject for an audit on or after January 1, 2003. Section 10106.1(2) has been modified in response to comments that the section allows too much discretion. It has been modified to refer specifically to Labor Code section 5814 penalty decisions or findings, and no longer contains reference to findings by the Rehabilitation Unit or other decisions that document claims administrator failures to meet their obligations. It is also modified to state that selection for target audit is based on a ratio of the Labor Code section 5814 penalties compared to the number of claims reported at the adjusting location. Section 10106.1(3) is modified to clarify that the Audit Unit will not base a target audit on an anonymous complaint unless the complaint is supported by credible evidence. Additionally, in response to comments that target audits should not be based on the discretion of the Audit Unit, the modifications require that once a year, the Audit Unit will compile a list of complaints and assign points based on the severity of the violation (one point for each \$100 in penalties assessable pursuant to Sections 10111 and 10111.2) and based on credible complaints that indicate claims handling for which a civil penalty may be assessed.

Modifications to section 10106.5 Civil Penalty Investigation

Reference to Labor Code section 129.5(d) has been corrected to refer to section Labor Code section 129.5(e). Also, in response to comments, language has been added that the Audit Unit shall report any suspected fraudulent activity uncovered during an audit or investigation to the appropriate law enforcing agencies.

Modifications to section 10107.1 Notice of Audit; Claim File Selection; Production of Claims Files; Auditing Procedure

Section 10107.1(c)(3)(C) has been modified in response to comments requesting clarification that the profile audit review performance rating will be published in the Annual DWC Audit Reports. Also in response to comments, the section is modified to state that “written” notification showing the Audit Unit’s calculation of the profile audit review performance rating will be given to the audit subject in time for the timely filing of an objection. Section 10107.1(m) has been modified in response to comments to clarify that the Audit Unit may request additional information or documentation more narrowly defined as “related to the claims being audited.” The section previously used the words, “related to claims handling.”

Modifications to section 10109 Duty to Conduct Investigation in Good Faith

Amended section 10109 added a definition of “acting in good faith.” Due to comments received stating that “good faith” should not be defined, the definition of “acting in good faith” proposed in the amended section 10109 has been deleted.

Modifications to section 10111.2 Full Compliance Audit Penalty Schedules; Target Audit Penalty Schedule

Proposed section 10111.2 sets forth the audit penalty schedules in compliance with the new requirements of Labor Code section 129.5. Based on comments concerning the penalty for late first payments of benefits, Section 10111.2(a)(5), (6), (7), and (8) has been modified to reflect higher penalties. Reference to Section 10108(c) and Section 10111.2(a)(2) and (a)(3) has also been added regarding penalty amounts for payments made over 30 days late. Section 10111.2(b)(4) has been also modified. The following language has been deleted: “The claims administrator shall not be subjected to penalty under this subsection if it demonstrates by clear and convincing evidence that the backdating, alteration, or withholding of the document was due solely to unintentional clerical error.” This language has been deleted in response to concerns regarding whether the audit subject could be required to bear the burden of proof.

Modifications to section 10113 Order to Show Cause re Assessment of Civil Penalty and Notice of Hearing

Section 10113(a) has been modified by replacing the words “a claims administrator” with the words “an audit subject.” Additionally, Section 10113(b)(1) has been modified in response to comments by replacing the words “adjusting location” with audit subject named in the order.” These changes are made to clarify that the imposition of a civil penalty may be assessed on the audit subject (as defined by Section 10100.2).

Modifications to section 10113.3 Administrative Director’s Designation of Hearing Officer

Section 10113.3 has been modified in response to comments. It now clarifies that the Administrative Director may delegate authority to a “Workers’ Compensation Administrative Law Judge” to act as the Hearing Officer.